Supreme Court, U.S.
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No. 01-631

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER DRAYTON and
CLIFTON BROWN, JR.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

This brief amicus curiae is submitted in support of Respondents Christopher Drayton and Clifton Brown, Jr., By letters filed with the Clerk of the Court, Petitioner and Respondents have consented to the filing of this brief. [1]

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

In NACDL's view, there are three important overlapping issues presented in this case: (1) should the type of police intrusion involved in this case be sanctioned by this Court: (2) under what circumstances can law enforcement officers' request for consent in a tight confines of a interstate bus be permitted; (3) how

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

should the question of consent be determined in inherently coercive circumstances?

NACDL, consistent with its mission, files this brief amicus curiae in support of Respondents' claim that the consent in this case was not freely and voluntarily given, as the 11th Circuit correctly determined. Justice Marshall wrote in dissent in this Court decision in *Florida v. Bostick*, 501 U.S. 429, 440 (1990), "the law-enforcement technique with which we are confronted in this case -- the suspicionless police sweep of buses in intrastate or interstate travel -- bears all of the indicia of coercion and unjustified intrusion associated with the general warrant." The type of intrusion involved here in the inherently coercive circumstances of a small bus cannot be allowed. Because the NACDL believes that the Fourth Amendment's strictures against warrantless searches and seizures without probable cause were violated in this case, it presents its view in this amicus brief.

STATEMENT

Amicus adopts Respondents' statement of the case.

SUMMARY OF ARGUMENT

This Court established a flexible rule in *Florida v. Bostick*, 501 U.S. 429 (1991) under which law enforcement requests for consent to search passengers on a bus must be weighed carefully. The key issue is whether weighing all the circumstances, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about

his business." The Court below considered a number of factors in this case, including the physical presence and positioning of the officers, the intimidating manner in which the requests for consent were made, the failure to assure passengers that they had the right to leave or refuse consent, and the intrusion into the bodies of the defendants (as opposed to a search of their luggage).

The Court's decision that the consent was not freely and voluntarily given was proper and should be respected.

ARGUMENT

THE CONSENT TO THE SEARCH WAS NOT FREELY AND VOLUNTARILY GRANTED

The circumstances under which the search in this case was accomplished was described by the Court below. Three officers went on board an interstate bus between Florida and Detroit. After the bus stopped at Ft. Lauderdale, three officers went on board. Judge Barnes described the events that followed:

> Once on board the bus the officers did not make any general announcements to the passengers nor did they hold up their badges for all of the passengers to see. Officers Lang and Blackburn made their way to the back of the bus, while Officer Hoover knelt in the bus driver's seat, facing toward the rear of the bus in order to observe the passengers and ensure the safety of the other officers. In that position, Hoover could see the passengers and they could see him.

231 F.3d at 789.

Two of the officers worked their way down the bus, questioning each passenger.

> Officers Lang and Blackburn went to the back of the bus and started working their way forward, asking passengers where they were traveling from, and attempting to match passengers to the luggage in the overhead rack. The officers did not block the aisle, but instead stood next to or behind the passengers with whom they were talking. According to Lang's testimony, passengers who declined to have their luggage searched or who wished to exit the bus at any time would have been permitted to do so without argument. *Id.*

The officers then came to Respondents' seat.

> Officer Lang had noticed that both defendants were wearing heavy jackets and baggy pants despite the fact that it was a warm day, and he thought that they were overly cooperative during the search. So Lang requested and received permission from Brown to conduct a pat-down search of his person for weapons. Brown leaned up in his seat, pulled a cell phone out of his pocket, and opened up his jacket. Lang then reached across Drayton and patted down Brown's jacket and pockets, including his waist area, sides, and upper thighs. In both thigh areas, Lang detected hard objects which were inconsistent with human anatomy but similar to drug packages he had found on other occasions. Lang arrested and handcuffed Brown, and Officer Hoover escorted Brown off the bus. *Id.*

Officer Lang then turned to Drayton.

> Lang next turned to Drayton and asked, "Mind if I check you?" Drayton responded by lifting his hands approximately eight inches off of his legs. Lang conducted a similar pat-down of Drayton's thighs. When Lang detected hard objects on Drayton's thighs similar to those he had felt on Brown, Drayton was arrested and escorted off the bus. *Id.*

Respondents were searched once they got off the bus.

> Once the defendants were off the bus, Lang unbuttoned their trousers and found plastic bundles of powder cocaine duct-taped between several pairs of boxer shorts. Drayton had two bundles containing 295 grams of cocaine, and Brown had three bundles containing 483 grams of cocaine. 231 F.3d at 789-790.

Under these circumstances, the 11th Circuit found that there was a "show of authority" by the officers on board that rendered any consent to search coercive. It did not establish or follow any *per se* rule that consents on busses are automatically coercive. The Court explained:

> Although there was no general show of authority at the front of the bus in this case, there was a specific show of authority passenger-by-passenger. Officer Lang approached the defendants with his badge held up in his hand, leaned over with his face 12-18 inches from Drayton's, and told the defendants that he was conducting a bus interdiction, looking for drugs and illegal weapons. We do not believe that a passenger-specific show of authority is any less coercive than a general bus-wide one. 231 F.3d at 790.

The Court below focused on the issue of what would have happened to passengers who left the bus after the police indicated that they would permit people to leave "without argument." The Court accepted the proposition that *in other situations*, no adverse action was taken against those who left the bus. "Lang testified that during the past year five to seven people had declined to have their luggage searched, and that passengers had often exited the bus while the officers were on it." 231 F.3d at 790-91. But given the large number of times Officer Lang had stopped busses and requested consents to search, that did not answer the problem of whether the request for consent *in this case* was coercive or not. "Officer Lang did not testify that the statements the officers made and the methods they used in the searches where passengers declined to give consent or exited the bus were the same as in this case." 231 F.3d at 791.

This Court noted in *Florida v. Bostick*, 501 U.S. 429, 436 (1991) that there is no *per se* rule relating to bus searches, as the Florida Supreme Court had seemed to establish in the decision appealed from in that case. The key legal issue is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Thus in a bus or at an airline terminal or in a factory, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business,'" *id.* at 437, citing *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)

There are a series of factors which must be considered to determine whether a "show of authority" rendered any later consent involuntary. The Second

Circuit explained in *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995): "To ascertain whether consent is valid, courts examine the totality of the circumstances to determine whether the consent was a product of that individual's free and unconstrained choice, rather than a mere acquiescence is a show of authority." (internal quotation marks and citations omitted). Further, as this Court held in *Schneckcloth v. Bustamante*, 412 U.S. 218, 222 (1973), the official claiming that a search was consensual has the burden of demonstrating that the consent was given freely and voluntary. Among the factors considered:

> would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 554 (1980).

Other courts have focused on "the place" where the request for consent was made, "the officer's tone of voice," whether the officer displayed a weapon or handcuffs, or "touched the individual without permission," threatened "or physically intimidated him," *United States v. Tavolacci*, 895 F.2d 1423, 1424-26 (D.C. Cir. 1990).

Lower courts (see discussion below) and academic literature note the special circumstances that arise when passengers are questioned in a bus: the tight confines, the lack of any real ability to simply walk away (as on the street or in an airport), the psychological pressure brought on the suspect because of the immediate presence of other passengers, the lack of any real warnings on the

alternatives available if consent is declined. One recent law review article after examining various "obedience studies" that indicate how verbal pressure can induce consent, has described the problem as follows:

> Relative to the distinction drawn in *Schneckloth* between the inherently coercive environment surrounding custodial interrogations and noncustodial search requests determined to be less susceptible to coercion, one can infer from the obedience studies that the bus setting can be leveraged by police to induce "consent." The confines of the bus coupled with questioning from an authority figure advance along the continuum toward the custodial interrogation pole and thus should require Miranda-like warnings to be delivered upon boarding and as part of the consent to search request.

Note, "The Long-Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battleground in the War on Drugs," 45 *Wm. & Mary Law Rev.* 365, 411-412 (2001).

The Article also described the importance of some warning in the special context of a bus search:

> The Supreme Court in *Bostick* found it "particularly worth noting ... [that] the police specifically advised Bostick that he had the right to refuse consent." No such warning was given in either *Guapi* [*United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998] or *Washington* [*United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998)]. The *Washington* panel, though it explicitly followed the Supreme Court's dictate against per se rules in the Fourth Amendment context, was especially clear that it viewed the combination of an on-bus encounter with an absence of warnings as a presumptive indication of a Fourth Amendment violation.

Id. at 412.

Under almost exactly the same circumstances as those described below, the Ninth Circuit found when three officers entered a bus and closely questioned passengers about possible contraband, they had created a coercive atmosphere in which the passengers were made to feel that they "not at liberty to ignore the police presence and go about his business." Therefore, the abandonment of a package by one of the passengers was not voluntary, just as the consent to search on this case was not voluntary. The Court explained:

> Police officers may not approach passengers on a bus, and request their consent to be questioned and searched if the officers "convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 437 (1991). The test for whether a bus search is constitutional is not whether a reasonable person would feel "free to leave." *Id.* at 436. The test is whether, considering all of the circumstances, "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.* This is because "when a person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Id.*

United States v. Stephens, 206 F.3d 914, 917 (9th Cir.

2000).

When officers board a bus under these circumstances and tell (i.e. warn) the passengers that they are free to leave, they give passengers a Hobson's choice, as the Ninth Circuit found.

> Here, the STING officers advised passengers that they were "free to leave" the bus. They did not tell passengers that they were free to remain on the bus and terminate the encounter by declining to answer their questions. The instructions given over the Greyhound public address system conveyed to passengers that they had two choices: stay on the bus and consent to the search, or get off the bus. This was a Hobson's choice because by getting off the bus, a passenger ran the risk of giving the STING officers reasonable suspicion to stop him. 206 F.3d at 917.

Similarly the Eleventh Circuit suppressed evidence after a consent search in a prior case, *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998). The Court found that the consent given to the search was coercive when two law enforcement officers came on a bus and declared that they would be asking each passenger to present photo identification and to identify his or her luggage. Consent to a body search was given by the defendant when he was approached and closely questioned by one of the officers.

> There is no doubt in this case that the encounter began with a "show of authority," because Agent Perkins held his badge above his head and identified himself as a federal agent. He announced what he wanted the passengers to do, and what he was going to do. Absent some positive indication that they

> were free not to cooperate, it is doubtful a passenger would think he or she had the choice to ignore the police presence. Most citizens, we hope, believe that it is their duty to cooperate with the police. 151 F.3d at 1357.

The Court below in this case did not establish a *per se* rule, condemning all bus searches and requests for consent. It took into account a number of factors: (1) the close confines of the bus; (2) the presence of three officers; (3) the placement of one officer at the front of the bus, suggesting that the passengers were confined; (4) the intimidating approach made by the officer to Drayton ("lean[ing] over with his face 12-18 inches from Drayton's, and [telling] the defendants that he was conducting a bus interdiction, looking for drugs and illegal weapons"); (5) the failure to make a general announcement in this case (as opposed to other instances in which the announcement was apparently made) that a inquiry was being conducted and but that persons were free to leave; (6) the intrusive search into the body of a passenger (as opposed to a search of luggage).

Under these circumstances, the decision of the Court correctly applied this Court's rule in *Bostick*. Its decision should be affirmed.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

Dated: New York, N.Y.
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